

United States District Court  
Eastern District of California

Casey Joseph Cicero,

Petitioner,

vs.

William Duncan, Warden,

Respondent.

No. Civ. S 04-2519 MCE PAN P

Findings and Recommendations

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Petitioner is a state prisoner without counsel seeking a writ of habeas corpus. He challenges a Sacramento County conviction of first degree murder (felony murder in the course of a robbery), for which he was sentenced to serve 25 years to life. The judgment was final December 23, 2003, 90 days after the California Supreme Court denied review.

The petition herein was filed November 29, 2004.

Petitioner and Maria Tenorio enticed the victim into their car with a promise of sex with Tenorio; they then attempted to

1 rob the victim, and petitioner or Tenorio stabbed him to death.  
2 Douglas Pugh later told the police petitioner admitted to him the  
3 attempted robbery and killing.

4 The original petition alleged the prosecution relied on  
5 Tenorio's testimony and Pugh's statement to police (which Pugh  
6 disavowed at trial). The pleading did not explain how that  
7 violated petitioner's constitutional rights<sup>1</sup> and, therefore, the  
8 court dismissed the petition for failing to state a federal  
9 claim. Petitioner filed an amended petition April 27, 2005,  
10 after the one-year limitation period expired.

11 The amended petition alleges (1) introduction of  
12 incriminating testimony from Tenorio, who had entered a plea  
13 agreement with the prosecution, violated due process; (2)  
14 introduction of Pugh's statement after he recanted it violated  
15 due process; (3) the state court's ruling that California's  
16 corpus delicti rule<sup>2</sup> did not apply to charges of felony murder  
17 violated equal protection and due process; and (4) petitioner was  
18 convicted based on insufficient evidence of the attempted robbery  
19 in violation of due process.

20 Respondent moved July 11, 2005, to dismiss the petition upon  
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22 <sup>1</sup> The rule that a criminal conviction cannot rest upon the  
23 uncorroborated testimony of an accomplice to a crime does not implicate any  
constitutional principle.

24 <sup>2</sup> Under California's corpus delicti rule, a defendant cannot be  
25 convicted based only on his extrajudicial statements, confessions or  
26 admissions. The rule ensures no one will be convicted falsely, based on his  
or her words alone, of a crime that never happened. Independent proof  
permitting an inference of criminal conduct satisfies the rule.

1 the ground claims one, two and four of the amended petition are  
2 unexhausted and claim three is time-barred.

3 Petitions presented to the California courts contained two  
4 arguments: (1) that the corpus delicti rule applied and, (2) if  
5 not, failure to apply it violated due process and equal  
6 protection. The second argument "fairly presented" to the state  
7 court petitioner's claim three herein, which is exhausted.

8 This sole exhausted claim is time-barred, however.  
9 Petitioner argues claim three relates back to his initial  
10 pleading, which complained about the use of Tenorio's testimony  
11 and Pugh's statement to convict him, thus raising "cumulative"  
12 parts of a single, exhausted claim. The state appellate court  
13 held that even if the corpus delicti rule were applied to felony  
14 murder charges against petitioner, his conviction would stand  
15 because evidence from Tenorio, Pugh, and other witnesses who saw  
16 the victim get in the car, and the victim's body dead of a stab  
17 wound, corroborated petitioner's admission.

18 This court finds petitioner's claims one and two are not  
19 cumulative to claim three; rather, they are entirely separate  
20 arguments positing an alternative ground for relief should claim  
21 three be rejected. Moreover, the events underlying claims one  
22 and two (admission of Tenorio's testimony and Pugh's statement)  
23 are different in "both time and type" from the events underlying  
24 claim three (instruction of petitioner's jury on the corpus  
25 delicti rule). See Mayle v. Felix, \_\_\_ U.S. \_\_\_, 125 S.Ct. 2562  
26 (2005). Claim three does not "relate back" to the initial

1 pleading.

2 Accordingly, the court hereby recommends respondent's July  
3 11, 2005, motion to dismiss be granted, claim three be dismissed  
4 with prejudice as time-barred, and claims one, two and four be  
5 dismissed as unexhausted.<sup>3</sup>

6 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these  
7 findings and recommendations are submitted to the United States  
8 District Judge assigned to this case. Written objections may be  
9 filed within 10 days of service of these findings and  
10 recommendations. The document should be captioned "Objections to  
11 Magistrate Judge's Findings and Recommendations." The district  
12 judge may accept, reject, or modify these findings and  
13 recommendations in whole or in part.

14 Dated: November 29, 2005.

15 /s/ Peter A. Nowinski  
16 PETER A. NOWINSKI  
17 Magistrate Judge  
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24 <sup>3</sup> Petitioner has moved the court to compel respondent provide him with  
25 transcripts his appellate attorney failed to give him. Delay in receipt of  
26 transcripts is of no present moment, because it could not have caused delay in  
presenting petitioner's untimely claim (which could have been pleaded simply  
by attaching appellant's opening brief on appeal). Whether good cause exists  
for delay in exhausting other claims is not before the court.